RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

MICHELLE K. LEE, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE,

Petitioner,

v.

SIMON SHIAO TAM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

AMICUS CURIAE PROFESSOR HUGH C. HANSEN IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

Professor Hugh C. Hansen is a law professor at the Fordham University School of Law where he is also the Founder and Director of the Fordham IP Institute and the Fordham Conference on Intellectual Property Law & Policy now in its 25th year. The conference has been called the "Davos of Intellectual Property" by the Director-General of the World Intellectual Property Organization based in Geneva. He is also Director of the Emily C. and John E. Hansen Intellectual Property Law Institute.[2]

He has taught intellectual property law for over 30 years and taught constitutional law for 25 years including a First Amendment course. Managing Intellectual Property Magazine has three times has named him one of the 50 most influential people in the world in IP.

As a result of two clerkships, litigation practice and over 30 years of teaching, Professor Hansen has developed a strong interest in approaching the law from a legal realist (lower case) perspective. He, with colleagues, is in

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1. Pursuant to Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus and the Emily C. and John E. Hansen Intellectual Property Law Institute has made a monetary contribution to the preparation or submission of this brief. Further, amicus curiae certifies that both parties have given blanket consent to the filing of amici briefs; the written consent on file with the Clerk.

2. Prof. Hansen's affiliation is for identification purposes only. His views are his own. Neither this brief nor the decision to file it should be interpreted to represent the views of Fordham University School of Law or the Fordham IP Institute.

the process of editing a casebook on intellectual property law for West Publishing that includes, perhaps for the first time, this perspective.

Professor Hansen expects that this perspective will not be presented by others on this appeal. He thinks and hopes that the issues in this case will benefit from such an analysis. This is not meant to denigrate any other form of analysis but rather to add something of value which otherwise would not be before the Court.

NOTE ABOUT THIS *AMICUS CURIAE* BRIEF

This brief is a different type of submission from what one would normally see in litigation, and certainly different from ones I have previously written. The purpose is not to debate the doctrinal free speech First Amendment issues. For the view I espouse, I refer to the majority en banc opinion of the Federal Circuit and the brief of the Respondent in this appeal, both of which are excellent in their legal analysis.

I am submitting this to suggest another way of looking at this controversy, and the applicable law. I use cites very sparingly because either the points are generally accepted or the statements are for background and not central to the discussion. In addition, I am consciously trying to lighten the load by making this brief as short as possible.

I am a legal realist (again lower case) and my analysis will reflect this. This brief may or may not be of assistance. I submit it for what it is worth.

HCH

SUMMARY OF ARGUMENT

Introduction

In a case such as this in which there is a clear First Amendment violation, the U.S. government and many amici argue that it does not apply because to do so would, in effect, leave a lot of people feeling bad. Of course, you only need the First Amendment free speech right in situations where people might feel bad because of differing opinions, accusations and positions. You do not need it when everyone agrees and are in harmony. Feeling bad at times might be the price we pay of having free speech and open debate. Apparently, today we are not willing to pay that price and that is a problem.

To be honest, the actual right of free speech has never had many true friends. It receives plenty of lip service. We are generally in favor of it when we like the speech for which protection is sought but find reasons to avoid it when we do not.

We should not forget that Justice Holmes' strong defense of free speech in *Abrams v. United States* was offered in a dissenting opinion.[3]

Individual rights are normally the concern of elites. We get rights from the top down, not bottom up. But elites today are not even giving free speech lip service. For instance, none of the briefs in support of Petitioner that were available when this was written said anything positive about the free speech right. They treated it as any other doctrinal rule to be analyzed and overcome.

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3. 250 U.S. 616, 624 (1919) (Brandeis, J. concurs).

Rather, today, elites are mostly concerned, not explicitly, with political correctness. Political correctness is not the province of any one group. Every group has some form of it. In fact, it can even start within the family unit. We have had it in some form probably as long as humans existed. In short, political correctness is us and we cannot avoid it.

Moreover, it is not intrinsically bad. It starts with a pure heart that some view or value is very important. The trouble starts over time when the original views or values cannot be challenged. As the group grows socially other penalties exist for non-adherence including the modern form of shunning. On a larger platform it adversely affects the democratic process.

In this country, in the past we had a mild form of political correctness. People with different views or in different groups interacted socially and politically. Today, in the U.S. political correctness is the worst it has ever been here and maybe the worst anywhere. Political correctness is the new tribalism. People in different tribes are demonized not debated. When you add the effect of social media, lives of the speaker and his or her family can be ruined based upon what is said. Free speech is severely penalized.

In this environment, it is safer not to think for yourself. As an act of self-preservation, it is better to support the "proper" tribal result and work backwards from that to create reasoning that keeps you safe.

Lee v. Tam will be remembered for a long time. It is the most important free speech case in many years. It

will decide whether we retreat further in to prohibited debate or instead strongly invigorate and support the public policies of free speech and debate.

The Federal Circuit en banc recognized this and ruled accordingly. It is now time for this Court to do so as well.

Argument

This case presents a clear cut First Amendment violation.

It is rare that a case doctrinally can have so clear a result as this one. The government chooses who are good guys and bad guys based upon views of the affected public who are allegedly disparaged. Then based upon that it decides whether to register a trademark. This is about the clearest violation of the free speech clause in the First Amendment one can imagine. There is no need to discuss this further here as there are the Federal Circuits excellent en banc decision and Respondent's excellent brief that provide specific arguments with which I wholly agree.

I. Actual role of courts in free speech cases.

There are many doctrinal tests used in First Amendment free speech cases. Ironically, the large number highlights the ad hoc nature of this jurisprudence. "New case, new doctrine" might be needed to explain a decision. In essence, there has been a common law approach which asks how much does the speech at issue need to be protected on these facts and in what manner? Based upon that test for the reasons given elsewhere in

this brief there is a strong need to allow expressive speech contained in trademarks.

II. Expressive trademarks such as Tam's can be an important part of the market place of ideas.

In our tribalized world with little or no incentive to engage in genuine debate or receive different ideas, no one can exclude ideas contained in trademarks such as THE SLANTS. They receive them without warning in the marketplace where they might actually consider the ideas on their merits – before they can jump-start their ideological protective screening. Moreover, they will normally receive them more than once.

Thus, the use of trademarks for expressive content is an important nascent marketplace for the reception and debate of ideas. Current construction of Section 2(a) effectively stifles this marketplace.

III. Elimination of the current disparagement regime would be a plus not a drawback.

There is no likely harm to the trademark system from this elimination. The concerns in the Law Professors Amicus Brief in Support of Petitioner relies upon a misguided and almost bizarre reading of footnote 1 of the decision which does not reflect anything in the opinion of the court, the briefing or argument of the parties, or commentaries after the case was decided.

The disparagement regime was created over 40 years after the enactment of the Trademark Act of 1946 and was not part of the intent of Congress. Its elimination would bring the Act back to Congress' original intent.

IV. By determining what marks individuals and groups may use to define themselves, the government is restricting self-expression and depriving them of personal autonomy.

As Justice Marshall observed:

> The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity.

Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring). Contrary to these purposes, Section 2(a) interferes with the ability of individuals and groups to define themselves. Instead, it tasks USPTO trademark examiners with determining *for others* what is and is not disparaging *for them and others*.[4] Such paternalistic

4. There are numerous examples of minority groups attempting to register marks deemed to disparage the very group of which they are a part. However, many of these attempts are rejected or ultimately abandoned under the power of 2(a)'s disparagement clause. *See e.g.*, THE BIG HEEB BREWING COMPANY Serial No. 78/432,597, filed June 9, 2004; N.I.G.G.A. NATURALLY INTELLIGENT GOD GIFTED AFRICANS Serial No. 75/002,364, filed Oct. 6, 1995. The application was ultimately abandoned; BABY JAP by a Jewish woman for clothing. Serial No. 78/665,332, filed July 7, 2005. Rather than protecting the marginalized and subjugated, the U.S. government's bar on registration for such reappropriated marks condones their oppression.

regulation and suppression of speech, even in the commercial context, has been consistently discouraged.

V. There is significant harm to mark owners who have been denied registration.

Judge Plager of the Federal Circuit has noted that "the mark holder who is denied federal registration [because of Section 2(a)] will not receive the benefits conferred on a federal trademark registrant," *Ritchie v. Simpson*, 170 F.3d 1092, 1099 (Fed. Cir. 1999). Judge Moore, in her "additional views" *In re Tam*, 785 F.3d 567, 575-77 (Fed. Cir. 2015), and in her en banc opinion, 808 F.3d 1321, 1328-29, 1340-44 (Fed. Cir. 2015) catalogues the many ways lack of registration harms the mark owner.

In addition to these explicit harms it should be noted that a mark cancelled or denied registration because of disparagement is the equivalent to a criminal record for an individual. There is a stigma that has to be overcome. A person can be rehabilitated but there is nothing a mark can do to achieve that. This stigma will affect, if not preclude, sales, licensing and investment in the mark. It will also similarly affect the product which will become an IP orphan, and there are no IP orphanages.

ARGUMENT

I. The actual role of Courts in free speech cases has been to determine how much speech should be protected and in what manner.

The role of the First Amendment in protecting "free speech" has changed dramatically since the Amendment was adopted in 1791. Today, the limited "no prior restraint" view of the Framers would be unthinkable. On the other hand, the Framers would not recognize the expansive approach of Justice Holmes, let alone the even broader view that prevails today.

This progressive doctrinal change is the product of courts' de facto common-law approach to the First Amendment, which has been adapted over time to changing circumstances. Such adaption has led courts to create rules not directly derived from the words of the Constitution but based on how they believed free speech should be protected in various settings.

Another way of looking at First Amendment jurisprudence is that it is more of an ad hoc approach in which judges were not particularly concerned with establishing or applying rules, but rather with reaching the perceived correct outcome on the facts. Such flexibility has made any synthesis of the applicable law more difficult, even as it has allowed courts to be more responsive in individual instances.

Thus, the basic issue before this Court is the one underlying all free speech cases: Is there speech to be protected? If so, how much speech needs to be protected

on these facts and in what manner? As this brief will show, there is a strong need for high protection for expressive marks from denial of registration by the "disparagement" clause of the Lanham Act.

II. The use of trademarks for expressive content is an important nascent marketplace for the reception and debate of ideas.

Oliver Wendell Holmes extolled the idea that freedom of speech in the First Amendment is based upon a marketplace of ideas. *See Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting). No ideas are sacrosanct and all have to withstand scrutiny and debate. Truth will win out in this process and democracy will benefit.

While that is a very worthy ideal, it is difficult to find any such marketplace today. Newspapers are in decline. Television news shows are divided ideologically with viewers driven by confirmation bias. The Internet is primarily a gathering place for digital mobs ready to tar and feather those who hold opposing views.

The rest of us have gathered not in the public square but in private groups where admission is dependent upon adherence to politically-correct orthodoxy. It is safe inside these groups where shared views are sacrosanct, and they never have to withstand scrutiny. Opposing views are there too, but only to be mocked from a distance.

In this environment, free speech is permitted for somebody with the same views but is disdained when it comes to opposing ones. Political correctness is the new tribalism.

On top of this, students in some our best schools are shielded from information inside or outside of class that might trigger unpleasant feelings. Safe spaces abound. Free speech is the problem not the solution.

It is upon this highly-fraught platform that the USPTO argues that it should be able to enforce politically correct views through Section 2(a). It tells those that are distressed, and are in an eligible group, that it will challenge offensive marks on their behalf or allow the distressed to do it themselves. It will not debate these marks in the public square but rather will exclude them from it.

Respondent's mark, which encapsulates their controversial ideas, is barred because of those ideas. Yet it is such use of expressive trademarks that are the best hope for a marketplace of ideas. No private group can exclude their ideas because they cannot insulate themselves from exposure to THE SLANTS. Moreover, people receive the name without warning in neutral territory – in a setting where they might actually consider the ideas on their merits – before they can jump-start their ideological protective screening.

In sum, the use of trademarks for expressive content is an important nascent marketplace for the reception and debate of ideas. Current construction of Section 2(a) effectively stifles this marketplace and, as will be discussed, does serious harm to mark owners and to the public as well.

III. Elimination of the current disparagement regime would be a plus not a drawback.

A. Law Professors Amicus Brief in Support of Petitioner. This states that if the Federal Circuit's decision is upheld it could "allow for numerous provisions of the Trademark Act to be overturned dismantling the modern trademark system." p.2. This "sky is falling" scenario is just as mistaken as was that of Chicken Little, actually hers, which was based upon an acorn falling on her head, was more credible.

The Professors' concern is footnote 1 at the beginning of the decision which is clearly concerned with the "immoral and scandalous" subsection of 2(a) provision, which the Court specifically stated it was not addressing in its opinion. *See In re Tam*, 808 F.3d 1321, 1330 n.1 (2015). It also addresses the precedential affect of *In re McGinley*, 660 F.2d 481 (CCPA 1981), and that it would not preclude consideration of the constitutionality of "scandalous and immoral" if and when that case arose.

The Professors' brief apparently rely upon the court speaking of Section 2 and not just those two subsections of Section 2(a). However, if the court was opening up the constitutionality of the whole trademark system as claimed by the Professors, this would have been a major concern in the case. No one has ever suggested that this was a possibility. It was not briefed nor addressed at the oral argument of the panel or at the en banc oral argument. If was a possibility, it certainly would have found room at least in one of the majority, concurring, or dissenting opinions. It was in none. An issue of this magnitude would not have been left to a housekeeping footnote.

Finally, as noted, the Court specifically stated that even the constitutionality of the related "immoral and scandalous" subsection of 2(a) was not being addressed in the opinion. This indicates the very narrow scope of the opinion, not the bizarre broad reading of the Professors.

B. The Disparagement provision. First, this type of disparagement enforcement is relatively new, and was not envisioned by Congress in 1946. In fact, the provision did not originate as the result of a clearly felt need but rather appears to have been meant to fill potential gaps in the other provisions. *See Hearings of H.R. 4744 Before the Subcomm. On TradeMarks of the Committee on Patents*, 76th Cong., 1st Sess. 20-21 (1939). In any case, legislators did not envision this regime. Removing it would leave the law as intended by Congress in 1946.

Yet, even those who believe in a governmental a politically correct enforcement regime should be concerned with the current one.

For instance, should the Boy Scouts lose their mark? A disparagement attack could be used to force a "proper" resolution of whether the organization should allow gay scouts and scoutmasters. There are people on both sides who are genuinely upset over this issue and might feel that the mark under the wrong regime would sully or disparage scouts as a group or "the scouting way."

The NAACP is cancellation proceeding just waiting to happen. The acronym, of course, stands for the National Association for the Advancement of Colored People. While the organization was founded in 1910, it was only registered in 1982, not long enough ago to

argue that "colored people" was acceptable at the time of registration. Of course, it would be seriously politically incorrect to attack the NAACP. Yet, political correctness cannot be controlled. There might be people out there for whom it would be politically correct to attack it, and use cancellation as a weapon against it.

This current system is also perfect for disparagement trolls. They can bring or threaten to bring opposition and cancellation proceedings against unsuspecting mark owners. This would be based upon members of the affected public's "heartfelt" beliefs, who should not be hard to find for a committed troll in our current culture.

In short, an application of the First Amendment here would not disrupt a valuable regime. Rather, it would disable a regime that is already badly flawed and could go seriously wrong.

IV. By determining what marks individuals and groups may use to define themselves, the government is restricting self-expression and depriving them of personal autonomy.

As Justice Marshall observed:

> The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity.

Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

Contrary to the purposes mentioned by Justice Marshall, Section 2(a) interferes with the ability of individuals and groups to define themselves. Instead, it tasks USPTO trademark examiners with determining *for others* what is and is not disparaging *for them and others*.[5] Such paternalistic regulation and suppression of speech, even in the commercial context, has been consistently discouraged. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510 (1996) ("legislature does not have broad discretion to suppress truthful nonmisleading information for paternalistic purposes"); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (rejecting state's "highly paternalistic" approach to pharmacist advertising). Further, the First Amendment is "designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us." *Cohen v. California*, 403 U.S. 15, 24 (1971).

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5. There are numerous examples of minority groups attempting to register marks deemed to disparage the very group of which they are a part. However, many of these attempts are rejected or ultimately abandoned under the power of 2(a)'s disparagement clause. *See e.g.*, THE BIG HEEB BREWING COMPANY Serial No. 78/432,597, filed June 9, 2004; N.I.G.G.A. NATURALLY INTELLIGENT GOD GIFTED AFRICANS Serial No. 75/002,364, filed Oct. 6, 1995. The application was ultimately abandoned; BABY JAP by a Jewish woman for clothing. Serial No. 78/665,332, filed July 7, 2005. Rather than protecting the marginalized and subjugated, the U.S. government's bar on registration for such reappropriated marks condones their oppression.

Moreover, once the USPTO denies a mark on the basis that it is disparaging, it is as a practical matter declaring it permanently to be so despite what cultural changes may transpire over time. In recent years, minority groups have often reappropriated terms considered disparaging, transforming slurs into as an empowering form of speech and self-identification. *See, e.g.*, RANDALL KENNEDY, NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD 38 (2008) ("[African Americans] have added a positive meaning to nigger, just as women, gays, lesbians, poor whites, and children born out of wedlock have defiantly appropriated and revalued such words as bitch, cunt, queer, dyke, redneck, cracker, and bastard.")

As it stands, it would seem highly unlikely that even if a once "disparaging" mark was reapplied for after being reappropriated, that any subsequent USPTO examiner would approve a mark previously deemed "disparaging." It would be a can of worms they would not want to open.

Finally, it is inappropriate for the government to be choosing among contemporary choices of an individual or group wants to call itself. Justice Thurgood Marshall continued to use the term "Negro" from the bench until he retired and in opinions through 1988, when he switched to "Afro American." The New York Times, Sec. A, p 21, col. 2 (October 17, 1989) He said he never liked the term "black" and would not use it.

Should it be up to an Examining Attorney and the PTO, in the first instance anyway, to determine what name he could use in a mark? But would Justice Marshall have tried to use it in a mark? Probably not, indicating that the disparaging provision is a de facto prior restraint on use of speech in marks.

Another example is that the NAACP continues to use the spelled out words "Colored People" in its name on it website and elsewhere. Undoubtedly, it is proud of its heritage. Under Federal Circuits Court's liberal standing rules, however, a person of any race could object to what they considered disparaging words and seek cancellation. *See Ritchie v. Simpson*, 170 F.3d 1092, 1097 (Fed. Cir. 1999) ("the potential injury sustained if the mark is registered is the disparagement of [plaintiff's] alleged belief in a loving and nurturing relationship between husband and wife.) These standing rules would allow members of the public to harass mark owners not in spite of but because of their protected speech.

V. There is significant harm to mark owners who have been denied registration.

Judge Plager has noted that "the mark holder who is denied federal registration [because of Section 2(a)] will not receive the benefits conferred on a federal trademark registrant," *Ritchie v. Simpson*, 170 F.3d 1092, 1099 (Fed. Cir. 1999). Judge Moore, in her "Additional Views," *supra*, catalogues the many ways lack of registration harms the mark owner.

In addition to these explicit harms it should be noted that a mark cancelled or denied registration because of disparagement is the equivalent to a criminal record for an individual. There is a stigma that has to be overcome. A person can be rehabilitated but there is nothing a mark can do to achieve that. This stigma will affect, if not preclude, sales, licensing and investment in the mark. It will also similarly affect the product which will become an IP orphan, and there are no IP orphanages.

Moreover, because of the lack of support it will be hard to build goodwill in the mark. What goodwill has been obtained will be "fair game" for free riders who know that enforcement will be very difficult for the owner. Ironically, this might cause more dissemination of the disparagement than if the mark were registered.

In addition barring registration would preclude any protection for a collective mark in its capacity as a collective mark with use "by the members of a cooperative, an association, or other collective group or organization" 15 U.S.C.A. § 1127. This is because there is no protection at common law for them. *See Huber Baking Co. v. Stroehmann Brothers Co.*, 252 F.2d 945, 952 (2d Cir. 1958) ("collective mark was unknown to the common law, it is actually a creature of federal statute.") and collective marks would be particularly useful to groups who are debating and fighting for the proper designation and names for people within the group.

CONCLUSION

Amicus Curiae supports the Respondent's position that the bar on registration of disparaging marks in §2(a) of the Lanham Act, 15 U.S.C. §1052(a), violates the First Amendment and, as a consequence, the Federal Circuit's en banc decision should be affirmed.

Respectfully Submitted,

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